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U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
LIN 03 067 50025

Office: NEBRASKA SERVICE CENTER

Date: DEC 02 2004

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a certified Korean-style cuisine chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the director erred in concluding that the petitioner has not had the financial ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 10, 2001. The proffered wage as stated on the Form ETA 750 is \$24,000 annually. On Form ETA 750B, signed by the beneficiary on August 6, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, the petitioner states that it was established in 2000 and currently employs five workers. It claims to have a gross annual income of \$182,000 and a net annual income of \$26,348.

In support of its ability to pay the beneficiary's proposed wage offer of \$24,000 per year, the petitioner initially submitted an incomplete copy of the sole proprietor's individual federal income tax return consisting of the 2001 Schedule C, Profit or Loss From Business. It shows that the sole proprietor reported a net business income of \$26,348 based on gross receipts or sales of \$181,726, cost of goods of \$61,926, and total expenses of \$93,452.

Because the petitioner failed to submit sufficient evidence supporting its continuing ability to pay the proffered wage, on April 26, 2003, the director requested additional documentation pertinent to that ability. The director instructed the petitioner to submit copies of its 2001 and 2001 federal income tax returns. The director also advised the petitioner to submit a list of recurring household expenses.

In response, the petitioner submitted copies the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2001 and 2002. The 2001 tax return reflects that the sole proprietor filed as a head of household and declared two dependents. She reported an adjusted gross income of \$24,615, including the petitioning business' net business income of \$26,348 as mentioned above. The 2002 individual income tax return reflects that the sole proprietor declared adjusted gross income of \$25,716, including net business income of \$27,591 from the petitioning business, as indicated on Schedule C. The sole proprietor also included her affidavit and accompanying documentation related to her residential property, ownership of two motor vehicles, a money market account held in the name of one of her minor children showing a balance of \$70,025.13 as of June 10, 2003, and three credit card accounts. The sole proprietor states that her equity in her home and vehicles, together with the money market account and the credit available on the credit cards would be available to pay the proffered wage. She includes a list of household expenses totaling \$1,839 per month and also states that the alien beneficiary was supposed to replace a chef who wanted to retire. Additional documentation in the form of two Form 1099s (Miscellaneous Income) for 2001 and 2002, reflects that the petitioner paid an individual named "Soo Lee" \$24,000 as an independent contractor.

On August 22, 2003, the director denied the petition. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date of August 10, 2001. The director concluded that after considering the level of the sole proprietor's living expenses, the remaining amount would not be sufficient to support the sole proprietor, and her two dependents. The director declined to consider the sole proprietor's personal residence, vehicles, and credit card limits as assets available to pay the proffered wage. The director further noted that the record failed to establish that the money market account statement, dated June 10, 2003, held in the sole proprietor's child's name, provided access for the sole proprietor to use it for payment of the proffered wage or that it had been available since the priority date of August 10, 2001.

On appeal, counsel resubmits copies of the documentation related to the sole proprietor's personal residence, vehicles, and credit card lines of credit, and asserts that these represent personal assets, which were available to pay the proffered wage. Although counsel also mentions the petitioner's statement that she has a money market account worth \$70,000, the questions raised by the director's observations pertinent to the availability of the minor child's account to pay the proffered wage and the date that it may have been available, have not been answered on appeal. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner's continuing ability to pay a proposed salary offer be established as of the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by credible documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage during a given period. To the extent that a petitioner may be paying a beneficiary less than the proffered wage, consideration will be given to those wages. If the shortfall can be paid out of either a petitioner's net income or net current assets, a petitioner will be deemed to have established its

ability to pay the proffered wage during a given period.¹ In the instant matter, the petitioner had not employed the alien beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts or gross profits exceeded the proffered wage or reached a particular level is insufficient because such a review must necessarily include consideration of the expenses incurred in order to generate such revenue. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, the petitioner has submitted copies of the sole proprietor's individual tax returns for 2001 and 2002. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's adjusted gross income, cash or cash equivalent assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000, or approximately thirty percent (30%), of the petitioner's gross income.

In the instant case, the sole proprietor's 2001 and 2002 tax returns show that, with the exception of a small sum of earned interest, her adjusted gross income was derived exclusively from her business. Even without considering her monthly expenses annualized to \$22,068, it is noted that the alien's proposed wage offer of \$24,000 represented approximately 97% of the sole proprietor's adjusted gross income in 2001 and 93% of the sole proprietor's adjusted gross income in 2002. Although the sole proprietor's household was comprised of fewer

¹ Net current assets are the difference between current assets and current liabilities. It represents the level of liquidity that a petitioner may possess as of the date of filing and represents cash or cash equivalents that may be available to pay the proffered wage during a given period.

dependents than in *Ubeda*, the comparison of the beneficiary's proposed wage measured against the sole proprietor's adjusted gross income of \$24,615 and \$25,716 suggests that it was highly improbable that reasonable living expenses, as well as the proffered wage, could be met out of the sole proprietor's adjusted gross income during either year. After paying the proffered wage, the sole proprietor and two dependents would only be left with less than \$2,000 to pay household expenses. Although the sole proprietor asserts that she did not need her business' net profit to live on, it is unclear, other than borrowing against her home, credit cards, or vehicles, or using her child's money market account, what other individually held existing net assets she had readily available to her as of the visa priority date of August 10, 2001.

Counsel's contention that a sole proprietor's other personal assets may be considered in support of a sole proprietorship's ability to pay a proposed wage offer is accurate, but this must be viewed in a reasonable context, and in terms of either the willingness to liquidate or borrow against the value of a personal residence or personal vehicles, the AAO cannot disagree with the director's conclusion that this should not generally be considered in the consideration of an individual sole proprietor's net current assets readily available to pay the proffered salary. CIS will give less weight to loans and debt as a means of paying salary since the debts will increase a petitioner's liabilities and will not improve the overall financial position. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Similarly, CIS will not augment the petitioner's net income or net current assets by adding in a line of credit available through borrowing against the limits of a credit card, as it represents the acquisition of debt and a potential liability. It will not be treated as cash or as a cash asset available to pay the proffered wage. Although counsel cites a 1996 AAO decision in support of this reasoning, it is noted that this decision does not constitute a binding precedent within the terms of 8 C.F.R. § 103.3(c). That regulation provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The monies already expended by the petitioner on other employees' salaries are not generally considered to be readily available funds to pay the proffered wage as of the visa priority date unless the alien is to replace the employee and the employee has left the business. Although on appeal, counsel states that the existing chef has now retired anyway, the projection that his salary would have been applied to the alien's proffered wage at the time of filing in 2001 is not sufficiently persuasive enough to outweigh the other evidence presented in the tax returns. A visa petition may not be approved based on speculation of future eligibility or after eligibility is established under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, *supra*.

Based on a review of the record and considering the evidence and argument presented on appeal, the AAO cannot conclude that the director erred in finding that the petitioner had not sufficiently demonstrated its continuing ability to pay the proffered wage beginning at the visa priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.